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No. SC19-1624
Lower Tribunal No. 2008-CF-10726

IN THE
Supreme Court of Florida

KIM JACKSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge James Daniel
Judge of the Circuit Court

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This proceeding is Mr. Jackson's appeal of the circuit court's denial of his Motion to Vacate Judgment of Conviction and Sentence under Fla. R. Crim. P. 3.851, filed contemporaneously with his initial petition for habeas corpus. The State filed its Answer Brief to Mr. Jackson's appeal of his initial 3.851 motion, and this Reply follows. This Reply will address only the most salient points argued by the State. Mr. Jackson relies on his Initial Brief in reply to any argument raised by the State that is not specifically addressed in this Reply.

CITATIONS TO THE RECORD

The following will be utilized to cite to the record: "R." refers to the trial record on direct appeal followed by the page number; "T." refers to the trial transcript followed by the page number; "PCR." refers to the post-conviction record on appeal followed by the page number; "IB." refers to Appellant's initial brief followed by the page number; and "AB." refers to the State's Answer followed by the page number. Any additional citations will be self-explanatory.

ARGUMENT IN REPLY

The State's evidence against Mr. Jackson in this capital murder case was limited to a single hair found on the victim's leg

that was a DNA match with Mr. Jackson's known DNA profile, a fingerprint found in blood on the lip of the kitchen sink in the victim's home that was "matched" to Mr. Jackson, and his denial to law enforcement officers of knowledge of the victim or having ever been in her home. The physical evidence did no more than place Mr. Jackson at the scene.

In the defense's case in chief, trial counsel put forward witnesses to Mr. Jackson's alibi defense and he testified on his own behalf. The jury, notwithstanding the physical evidence the State characterized as a "blowout" (T. 826), requested that the testimony of Mr. Jackson's alibi witnesses be read to them again. The jury clearly had questions about the sufficiency of the evidence against Mr. Jackson. Indeed, the trial court commented several times on the limited evidence against Mr. Jackson, including one comment at trial that the case was about DNA evidence and a fingerprint. (R. 1759).

Lack of pre-trial preparation that resulted in myriad substantial errors by trial counsel during Mr. Jackson's guilt phase rendered the jury's verdict for first-degree murder unreliable. The State has argued that there were no errors or that any errors argued by defense

counsel in post-conviction are barred or absolved as reasonable trial strategy.

The State's argument that post-conviction counsel cannot prove that no reasonable attorney would have acted as trial counsel did under circumstances identical to those that faced trial counsel in the instant case misunderstands *Strickland* and imposes an almost impossible burden on any defendant to obtain relief. (AB. 45, 60, 69, and 75). To obtain relief under the already difficult *Strickland* standard, a defendant must prove deficient conduct by trial counsel that resulted in a reasonable probability that the outcome of the trial would have been different. Trial counsel in this case were unprepared for trial, failed to effectively investigate and challenge the State's case, and failed to present an effective alibi defense.

There was no overwhelming evidence of guilt in the trial below and trial counsels' strategies were not based upon a reasonable investigation. The State's evidence would have been overcome had trial counsel challenged it piece by piece at trial after a thorough pretrial investigation and there can be no confidence in the jury's verdict.

ISSUE 1 IN REPLY: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND CHALLENGE THE DNA EVIDENCE AND THE RESULTING PREJUDICE UNDERMINES ANY CONFIDENCE IN THE VERDICT

The circuit court found deficient conduct by trial counsel in the investigation of the DNA evidence, stating in his order on Mr. Jackson's Rule 3.851 motion, "there is no question that aspects of Defense counsels' overall performance related to the DNA evidence in case were below what would reasonably be expected of an attorney defending a capital case." (PCR. 1582). Nevertheless, the court then found no prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984), and the State has argued the trial court rulings were correct.

The circuit court's finding of no prejudice to Mr. Jackson is unreasonable under these facts. Lead trial counsel, Michael Bateh, pleaded with the trial court for a continuance of the trial so that he could retain experts to avoid being ineffective on November 7, 2012 after prior trial counsel had done no investigation of the DNA evidence since their appointment in June 2009 except for filing a motion for the laboratory's case file in January 2010. (R. 395-97). The trial court granted Mr. Bateh's request for a continuance of the

trial until April 15, 2013 and admonished him to prepare for trial. (R. 994). Mr. Bateh did not begin to search for a DNA expert until February 2013. He retained Nancy Peterson, a former FDLE DNA examiner, on February 25, 2013 but sent her latent fingerprint records on two separate occasions instead of the DNA records she requested. (PCR. 2225, 1274-78, 2231). She wrote to him and explained that she was not a latent print examiner. (PCR. 2232-34, 1276-78). Mr. Bateh finally obtained the FDLE DNA case file on April 3 or 4, days before the start of the trial, and sent Ms. Peterson the records on April 4. (PCR. 2236, 1279, 1263). He did not make arrangements for her to appear in court, did not inform her of the trial dates, and imparted no sense of urgency to her that the trial was imminent in the letter or in his conversation with her the day before trial. (PCR. 2236, 1279). Mr. Bateh did not speak to Ms. Peterson until April 14, the day before trial when she began her review of the records. (PCR. 2281, 1413). He did not respond to an email she sent him the afternoon of jury selection and he did not call her at trial as a defense witness. (PCR. 2283).

As a result, defense counsel missed critical opportunities to challenge the State's evidence. Had counsel timely retained a DNA

expert and had her in court to observe the State's witness's testimony, trial counsel would have learned that the witness violated FDLE protocols for testifying outside the bounds of her report, that Mr. Jackson was excluded as a donor to the DNA mixture found on the steering wheel cover of the victim's van, explained to the jury that a naturally shed hair with a root could produce a full DNA profile, and explained how easily hair is transferred and how, under innocent circumstances, Mr. Jackson's hair could be found on the victim's leg. Had counsel timely and effectively investigated and challenged this linchpin evidence, there is a reasonable probability that the outcome of Mr. Jackson's trial would have been different.

The blood on the steering wheel cover

Blood collected from the steering wheel cover of the victim's van was tested by FDLE DNA examiner Leigh Clark who found a mixture from two individuals. (PCR. 1416-18). Ms. Clark identified the major contributor as the victim, Debra Pearce, and wrote in her final report that the "DNA profile for the minor contributor could not be conclusively determined." (PCR. 1418, Exh. 15).

At trial, Ms. Clark testified that Mr. Jackson could not be excluded as the minor contributor to the blood mixture from the

steering wheel cover at CODIS genetic markers amelogenin (which determines the gender of the donor), D3, and vWA. (T. 468, 476-78). This testimony went far beyond her conclusion that the minor donor could not be determined in her written report that had been reviewed and approved by two other FDLE examiners as required by FDLE protocols. The circuit court found that this was not a change in calls contrary to the testimony of the expert retained by trial counsel and the defense expert retained by the defense for post-conviction investigation. (PCR. 1585). This finding was unreasonable in the face of testimony by the two defense experts, both former FDLE DNA examiners, who testified that Ms. Clark's testimony at trial that Mr. Jackson could not be excluded violated FDLE protocols. (PCR. 2295, 2367).

Ms. Peterson, the defense expert hired at the eleventh hour by trial counsel, testified at the evidentiary hearing that for Ms. Clark to write in her report that the minor donor to the blood on the steering wheel cover was inconclusive and then to testify at trial that she could not eliminate Mr. Jackson was improper because of the low amount of DNA and was "wrong." (PCR. 2295),

Similarly, defense DNA expert Candy Zuleger also testified that

Ms. Clark went below the FDLE reporting threshold to find that Mr. Jackson could not be excluded as the minor donor to the DNA mixture on the steering wheel cover according to the FDLE protocol that should have governed Ms. Clark's findings and testimony. (PCR. 2367, 1419-32--Defense Exh. 16---FDLE Standard Operating Procedure for Interpretation of STR Data, §3.2, 3.7.9, 5.0, 3.11.3). FDLE's protocol provides that below threshold peaks may be used for exclusionary purposes only and not for inclusion. (PCR. 2374-79, 1416-1418, Exh. 16, § 5.0).

This testimony by Ms. Clark that Mr. Jackson could not be excluded was damning because the State offered testimony of Chester Narvell, a neighbor of Ms. Pearce, that her van was missing from her driveway several days before he discovered her body on October 18, 2004. (T. 372).

The prosecutor then offered testimony from the lead detective that the van was found close to Mr. Jackson's apartment (T. 764-66) and then argued to the jury in closing that the van was found near Mr. Jackson's home. (T. 833).

The circuit court's findings of no prejudice were unreasonable and the prejudice was substantial.

Hair is easily transferred

The circuit court found and the State has argued that the easy transferability of hair is not a subject for expert opinion because it is common knowledge, citing to *Reed v. State*, 875 So. 2d 415, 423 (Fla. 2004). The circuit court also found that trial counsel made the point through cross-examination of the State's DNA examiner. (PCR. 1590-91, AB. 48). However, the circuit court derisively dismissed this easy transference of hair explanation made by the defense in their judgment of acquittal argument. During that argument, the defense argued that the State's case was circumstantial and argued that the hair could have been transferred. (T. 653). The circuit court challenged defense counsel to offer a *reasonable* explanation for the presence of the defendant's hair on the victim's calf. (T.653). Counsel replied that the hair could have been in the victim's house prior to the murder and her cat transferred the hair to the victim's body. (T.654). The circuit court said, "That doesn't sound very reasonable to me" and denied the motion for judgment of acquittal. (T.654).

Clearly, the easy transference of hair was not common knowledge to the circuit court who hastily dismissed the idea that

the hair could have been transferred on to the victim's leg. And in his closing argument counsel made one mention in a fleeting paragraph that the hair was transferred. (T. 813). A defense expert, like Ms. Peterson or Ms. Zuleger, could have explained to the court and the jury that hair is easily transferred at a scene by people in the home (this home was looted by several individuals over the course of the two or three days before the victim was discovered), first responders, by the air handling system, by animals, and by other methods. Additionally, Ms. Zuleger testified that hair "has the lowest priority in cases" for testing because hair is so easily transferred. (PCR. 2354-55).

Clark's failure to run the Cofiler tests

FDLE examiner Clark testified at trial and acknowledged at the evidentiary hearing that she did not complete a required test on Ms. Pearce's known DNA sample because she had added too much DNA to the sample. (T. 459, PCR. 2452-53). All DNA samples from known sources or from crime scenes are tested at the CODIS genetic markers using commercially produced test kits called Cofiler and Profiler. Clark did not obtain results for the victim's DNA profile from the Cofiler kit. (*Id.*).

Ms. Zuleger testified that Ms. Clark should have obtained results from Cofiler on the victim's standard under FDLE protocols. (PCR. 2325-29). Ms. Zuleger explained that at the time of the testing conducted by Ms. Clark, FDLE required testing with two different test kits to test at the required 13 CODIS genetic markers. (PCR. 2325-26). Cofiler kits tested at four markers not included in the Profiler kit and tested at two markers included in Profiler. Using both kits, Profiler and Cofiler, expanded the testing to 13 markers and the overlap at the two markers acted as a source control. (PCR. 2326-27). Ms. Zuleger testified that the victim's sample was an important piece of evidence and should have been tested with both kits to add discrimination with the extra markers found in Cofiler and the overlapping markers in each kit act as a "source control." (PCR. 2326-27).

Ms. Clark testified for the State at the evidentiary hearing after she observed the testimony of Ms. Peterson and Ms. Zuleger while she waited to be called to rebut their testimony. (PCR. 2408). Ms. Clark testified that she did not run the Cofiler tests again although she could have. (PCR. 2452-54). Ms. Clark did not have the discretion to decide which protocols she would follow—she was

required to follow all of them by FDLE protocols. And that testimony did not square with Ms. Clark's testimony at the trial that she followed all protocols to ensure the reliability and accuracy of the DNA testing she conducted and that her work was reviewed by another qualified examiner and an administrator. (T. 454-455, 458).

Ms. Clark's failure to complete the Cofiler tests for the victim's DNA sample was a material violation of her lab's protocol according to defense expert Candy Zuleger. FDLE quality control standard operating procedures require analysts to perform tests that have been validated in the scientific community, which includes Cofiler, and that a second analyst review the interpretations. (PCR. 1429, Defense Exhibit 15). That failure and others should have been recognized by defense counsel and pointed out to the jury. The State's argument that counsel's "strategic decision" to avoid attacking Ms. Clark's testing methods is unavailing because strategy decisions must be made after a reasonable investigation and there was nothing reasonable about counsel's investigation. Here, no consideration could have been given to Ms. Clark's non-compliance with her own protocols because trial counsel never received them, much less understood them and their importance.

Here, Mr. Armstrong, third-chair counsel who conducted the cross-examination of Ms. Clark, testified that he had done no specific research on DNA issues for Mr. Jackson's case. (PCR. 2071). He could not have received the FDLE case file or bench notes before April 2, 2013 when the State sent the file to Mr. Bateh.

Moreover, Mr. Armstrong was unaware that his lead counsel had retained a DNA expert and had no contact or communications with that expert prior to his cross-examination of Ms. Clark. (PCR. 2051, 2056).

The "mere incantation of strategy" is not a magic elixir that cures counsel's deficient conduct because the claimed strategy must be based upon a reasonable investigation under the circumstances. *See Stevens v. Zant*, 968 F. 2d 1076, 1083 (11th Cir. 1992) (quoting *Lightbourne v. Dugger*, 829 F.2d 1012, 25–26 (11th Cir. 1987), and *Horton v. Zant,* 941 F. 2d 1449, 1462 (11th Cir. 1991) ("[t]he question of whether a decision was a tactical one is a question of fact.... However, whether this tactic was reasonable is a question of law, and we owe neither the district court nor the state court any deference on this point.")).

Failure to obtain correct results at the positive controls

The State excused Ms. Clark's failure to obtain proper results on the positive controls on a bloody rag as unimportant. (AB. 51). Ms. Clark's failure to obtain the correct results at the positive controls on this item of evidence was another example of her failure to follow protocols that are in place to ensure the accuracy of DNA test results.

Trial counsel should have been prepared to challenge Ms. Clark on this failure to obtain the correct results after she told the jury she followed the lab procedures.

Conclusion.

Trial counsel's objectively unreasonable investigation of the DNA evidence in this capital murder case was patently deficient conduct and the resulting prejudice undermines any confidence this Court can have in the verdict. The circuit court and the State's absolution of this deficient conduct by trial counsel as reasonable trial strategy cannot stand. Strategy decisions must be made after a reasonable investigation and there was none here.

ISSUE 2 IN REPLY: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND CHALLENGE THE FINGERPRINT EVIDENCE

The State argues that Mr. Jackson waived his argument that trial counsel was ineffective for conceding that the bloody fingerprint on the sink was Mr. Jackson's (in opening, immediately after positing to the jury that the print was not Mr. Jackson's, and then in closing), and failing to procure an expert to assist the defense on the fingerprint and issues surrounding it. As the State mentions, the post-conviction court found that Mr. Jackson waived this issue by not presenting it in the original post-conviction motion or at the evidentiary hearing. R. 1658. The post-conviction court and the State are mistaken. In his post-conviction motion, Mr. Jackson pleaded that his counsel was ineffective as a result of their "Failure to investigate the fingerprint evidence." R. 846. Moreover, the circuit court granting a hearing on that claim at the case management hearing and noted that the State had conceded that Mr. Jackson was entitled to a hearing on it. At that hearing, Mr. Bateh was questioned about offering the fingerprint examiner from the Jacksonville Sheriff's Office to testify that the fingerprint was not of value for comparison purposes only for her to concede on cross-examination that she could not exclude Mr. Jackson as having left the print. (PCR. 2247-48). Part of investigating the fingerprint evidence in this case

should have included that trial counsel hire an expert to assist the defense, much as in other areas of this case, rather than rely on a State expert's testimony in the case. By not procuring their own expert and attacking the State's case, even nonsensically arguing that the print was not their client's in one breath and in the next conceding that it was his, Mr. Jackson's trial counsel performed below the standards expected of reasonable trial counsel and was prejudiced as a result.

ISSUE 3 IN REPLY: TRIAL COUNSEL WAS INEFFECTIVE FOR ITS FAILURE TO PREPARE MR. JACKSON FOR HIS TRIAL TESTIMONY

The State urges this Court to not reach the merits of this claim because it was not presented to the post-conviction court. This is error. The State misapprehends Mr. Jackson's argument, just as the post-conviction court did, albeit in different ways. Mr. Jackson does not contend that it was ineffective assistance of counsel that different members of his defense team gave him conflicting advice on whether or not to testify, as the State characterizes the argument. Mr. Jackson also does not argue that it was ineffective assistance for trial counsel to not rehearse his testimony, as the post-conviction court held. Mr. Jackson is and has always contended that he suffered from

ineffective assistance of counsel because his trial counsel did not prepare him to testify.

As Deborah Jackson testified in the evidentiary hearing, Mr. Jackson received very little preparation before he testified. As a result, he was not at all prepared for an aggressive cross-examination from the prosecution. Mr. Jackson's testimony depicted himself as a callous, unsympathetic, remorseless, and selfish man. He even testified to an inflated number of prior convictions due to his counsels' erroneous advice as to the number of his felony convictions. A reasonably competent attorney would have better prepared Mr. Jackson for his testimony, ensuring his witness was ready for a difficult cross-exam and correctly advising him of the number of his prior felonies. Trial counsels' failure to do so in this case is deficient performance as contemplated in *Strickland*, and Mr. Jackson was prejudiced from it. There can be no confidence in the reliability of the jury's guilty verdict.

The State posits that Mr. Jackson did not prove deficient performance as it relates to Mr. Jackson being falsely counseled by trial counsel as to his number of prior felony convictions. Relying on the advice of counsel, Mr. Jackson testified to the jury that he had

five prior felony convictions instead of his actual four. The State argues in its Answer Brief that because Mr. Jackson did not present the actual judgement and sentences of conviction in evidence in the post-conviction evidentiary proceeding, that he fails to supply the proof of deficient performance. This Court can rely on the State's own concession at trial, however, as to the true number of convictions; the judgment and sentences themselves are unnecessary. (T. 12).

The State further argues that trial counsel was exercising strategic restraint in not pushing the point because if they had, the State could have admitted the certified copies of conviction into the record for the jury. This argument both misapprehends the thrust of Mr. Jackson's argument and offers a post hoc rationalization of trial counsels' actions.

Mr. Jackson's trial counsel unreasonably failed to investigate their client's own criminal record, a basic step before any attorney offers his own client as a witness. Trial counsel should have investigated the correct number of felony convictions during their deliberations over whether or not Mr. Jackson should testify. Knowing the correct number of convictions Mr. Jackson would need to admit to would be a fundamental part of the analysis of how trial

counsel should advise their client. The fact that trial counsel did not know the correct number, and even advised their client and the trial court of an incorrect, higher number, (T. 698), underscores that there was no reasonable investigation that triggers the high deference due to a trial counsel's strategic decisions. *Strickland*, 466 U.S. 668 at 690-91.

The State also inappropriately offers post hoc strategic reasoning for trial counsels' deficiencies on this point, even though trial counsel gave no justification in the evidentiary hearing below. The correct standard is to examine trial counsels' lack of investigation under "a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.' ('[E]very effort [must] be made to eliminate the distorting effects of hindsight')." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (citing *Strickland* at 688) (internal citations omitted). In this light, trial counsels' utter failure to prepare Mr. Jackson for his testimony and investigate his criminal history was deficient performance and resulted in prejudice to Mr. Jackson that renders the verdict in his trial unreliable.

ISSUE 4 IN REPLY: TRIAL COUNSEL DID NOT EFFECTIVELY INVESTIGATE AND PRESENT AN ALIBI DEFENSE

In its Answer Brief, the State urges this Court to disregard Mr. Jackson's sub-arguments concerning trial counsels' failure to elicit further details from witness Penny Williams and their ineffectiveness in instructing alibi witnesses not to mention that it was Kim Jackson's last birthday before going to prison for a long time to lend further credence to their testimony because neither issue was preserved. AB. 73. Specifically, the State alleges that Mr. Jackson did not raise these issues in his post-conviction motion and that the trial court did not rule on them, relying on *Deparvine v. State*, 146 So. 3d, 1071, 1102 (Fla. 2014), and *Henyard v. State*, 883 So. 2d 753, 759 (Fla. 2004), for the contention that this Court should not then even reach them. (AB. 80, 82).

Contrary to the State's assertion, Mr. Jackson did raise these arguments in the post-conviction court. In his original post-conviction motion, Mr. Jackson presented this issue under the heading "Failure to investigate and present an effective alibi defense." R. 854. He further argued that "The alibi witnesses offered at trial, with the exception of Deborah Jackson, the defendant's wife, were

inexact about when Jackson had been in Adel, but knew that it was around or after his birthday in October 2004. They were easily cross-examined on their uncertainty about the dates and their affection for Jackson." (R. 855). That specific subsection's conclusion began, "Trial counsel's completely inadequate investigation and presentation of Jackson's alibi defense at trial . . ." *Id*. While the post-conviction court did not specifically comment in its order on either trial counsels' failure to elicit further testimony from Penny Williams or from other alibi witnesses concerning Mr. Jackson's imprisonment after his last birthday trip to Adel, the facts underlying these claims were elicited at the post-conviction evidentiary hearing and therefore the post-conviction court was aware of them.

These facts fall under Mr. Jackson's pleaded claim of ineffectiveness of presenting an alibi defense. It is obvious that part of presenting an alibi defense is whether a lawyer elicits testimony, or not, from a witness he calls. Mr. Jackson's pleaded claim of suffering from an ineffective alibi presentation, including that witnesses were inexact about when Mr. Jackson was in Georgia and were easily cross-examined because of that uncertainty, properly put

the State and the post-conviction court on notice of the nature of his argument.

Accordingly, the State's reliance on *Deparvine* and *Henyard* is misplaced. *Deparvine* waited until closing arguments to raise a distinct claim under *Brady v. Maryland*, 373 U.S. 83 (1963), to the post-conviction court, a separate legal basis for relief that he had never raised before. *Deparvine*, 146 So. 3d. 1071, 1102 (Fla. 2014). Henyard also made a distinct claim, separate from his other claims, that trial counsel should have called four witnesses to show that he suffered from a lack of parental contact and supervision; it is not clear in the *Henyard* opinion whether he waited until closing argument or on appeal of his post-conviction motion to make this separate, definite claim. 883 So. 2d 753, 759. Regardless, the point is the same: Henyard waited until the eleventh hour to raise a separately cognizable legal basis for relief, end-running the properly contemplated post-conviction process, and depriving the post-conviction court and the State of full briefing and a hearing on the issue.

Mr. Jackson, in contrast, is not making a new claim in this appeal of his post-conviction motion. Mr. Jackson's claim has always

been and remains that his lawyers were ineffective in presenting an alibi defense. The facts in the Record below attest to that ineffectiveness of presentation in its numerous forms. The State cannot avoid addressing the specific permutation of ineffectiveness in presentation as they relate to Penny Williams not being asked specific details and alibi witnesses being instructed to not testify that this was Mr. Jackson's last birthday in Adel by claiming that the sub-argument was not raised below because those facts are in the Record and speak squarely to Mr. Jackson' pleaded claim.

ISSUE 5 IN REPLY: TRIAL COUNSEL WAS INEFFECTIVE IN PREPARING DEBORAH JACKSON FOR THE CROSS-EXAMINATION ON HER PRIOR CONVICTION

The State makes much of the fact that Deborah Jackson was impeached for a crime of dishonesty which required the State to prove her "knowingly" *scienter* as an element. Mr. Jackson does not take issue with the fact that the State impeached Deborah Jackson – indeed, any attorney who had even the most rudimentary of trial experience could have predicted that would happen.

Mr. Jackson's claim is instead that his trial counsel did not prepare Deborah Jackson for her testimony or redirect to establish

the context of her conviction. If trial counsel had done so, the jury would have heard the circumstances of the crime – that it dated back twenty years from Deborah Jackson's present testimony in Mr. Jackson's case, and was from a time when she was a single mother with three children who was both going to school full-time and working part-time. These details would not have rendered Deborah Jackson a liar in the eyes of the jury, as the State argues, even if the prosecutor re-crossed to introduce the *knowingly* element of her prior conviction. They would have established further context around the entirely proper impeachment from the State for the jury, allowing the jury the opportunity to fully evaluate Deborah Jackson's credibility as a witness. Such fleshing out is entirely proper: "The party presenting the testimony of the witness [impeached by prior convictions] may delve into the nature or circumstances of the convictions for the purpose of rehabilitating the witness by attempting to diminish the effect of the disclosures." *Moore v. State*, 765 So. 2d 925, 927 (Fla. 2000) (quoting *Lawhorne v. State*, 500 So.2d 519, 522 (Fla. 1986) (citations omitted)). *See also Green v. State*, 735 So.2d 568 (Fla. 2d DCA 1999); *Scurry v. State*, 701 So.2d 587 (Fla. 2d DCA 1997).

The circumstances Deborah Jackson could have told the jury had Mr. Jackson's trial counsel only asked were compelling. The crime of dishonesty the State used to impeach her was writing a bad check – something many people do unintentionally. The check was only for $50. Around the time of the crime, Deborah Jackson had lost a child. And, as mentioned earlier, the conviction was twenty years old, from a time when Deborah Jackson was a single mother with three children going to school full-time and working part-time. These details would have humanized Deborah Jackson; it is inconceivable why trial counsel chose not to inform the jury of them. R. 2304-05.

Ameliorating Deborah Jackson's impeachment in this manner, despite the State's assertions to the contrary, was crucial to this case. As Mr. Jackson's trial counsel admitted at the post-conviction evidentiary hearing, Deborah Jackson was the best alibi witness in the case. R. 1980. Despite this import, trial counsel did not prepare Deborah Jackson to testify at all, only meeting with her about testifying fifteen minutes before she took the stand. R. 2303.

The State was cognizant of Deborah Jackson's importance as well. The prosecution emphasized her prior conviction three times, urging the jury not to believe her testimony. (T. 799, 838-39).

Despite the State's efforts, the jury seriously considered Mr. Jackson's alibi, requesting to review Deborah Jackson's testimony during deliberations along with two other alibi witnesses', Penny Williams and Walter Jackson. (T. 876). Had trial counsel redirect Deborah Jackson to contextualize the circumstances of her conviction, thereby cutting off at the knees the State's attempts to undermine her veracity, there is more than a reasonable probability that the outcome of this trial would have been different.

The State's attempts in its Answer Brief to provide post hoc strategic justifications for trial counsels' failure to do so, even in the face of trial counsel's concession at the post-conviction evidentiary hearing that he could have done so, do not constitute a basis for this Court to find the conduct reasonable or strategic. Indeed, as mentioned in earlier issues in this Reply, such contortions are exactly what *Strickland* cautioned against and forbid when it urged that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland* at 670.

ISSUE 6 IN REPLY: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE OR FILE A MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

For the first time in all of these proceedings, the State, in its Answer Brief concerning this issue, raises the argument that this Court should recede from decades of settled precedent stemming from this Court's adoption, in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), of the legal standard in Florida for dismissals of cases based on pre-indictment delay as first promulgated in *Howell v. State*, 418 So. 2d 1164 (Fla. 1st DCA 1982). The State did not raise this argument in the circuit court and therefore deprived the trial judge a chance to rule on it.

In its response to this issue, the State cites federal case law from various Courts of Appeals and the United States Supreme Court in urging this Court to overrule its own precedent, which Florida courts have been following for decades with no issues. *See State v. Ellis*, 273 So. 3d 1126 (Fla. 3d DCA 2019) (applying the *Rogers* test for prejudice resulting from pre-indictment delay); *see also State v. Hope*, 89 So. 3d 1132, 1137 (Fla. 2012) (noting cases in which this Court applied the test of *Rogers*) (internal citations omitted). None of these

federal cases dictate any mandate that this Court is bound to follow. None preclude the test this Court adopted in *Rogers* nor affirmatively suggest that that case should no longer be good law in Florida. There has been no significant change in circumstances since the adoption of *Rogers* that would compel overruling it, and no demonstration that it is "unworkable" in practice. *E.g., Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (citing *N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637-38 (Fla. 2003)).

Nevertheless, and with the backdrop of the strong presumption in favor of *stare decisis*, *see, e.g., Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (citing *N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637-38 (Fla. 2003)), the State invites this Court to undertake an analysis of *Rogers* under the framework of reassessing precedent that this Court announced in *State v. Poole*, 297 So. 3d 487, 506-507 (Fla. 2020): if a case implicates a higher legal authority that this Court is sworn to uphold, and precedent clearly conflicts with that law and is clearly erroneous, that precedent normally must yield unless there is a valid reason *why not* to recede from it (emphasis in original).

This Court should not recede from its prior precedent in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), as the State suggests doing under the standards of *State v. Poole*, because this instant case is not "a case where [this Court] is bound by a higher legal authority - whether it be a constitutional provision, a statute, or a decision of the Supreme Court." 297 So. 3d 487, 507 (Fla. 2020). Despite what the State claims, Florida's precedent is not "contrary to Supreme Court precedent." AB. 33. In fact, there is no mandate on this question of law that this Court is duty bound to follow, except for its own valid precedent.

By its own motion, the State illustrates this very point, although it only does so after asserting otherwise - the United States Supreme Court, while admittedly holding that the circumstances where dismissal for pre-indictment delay as a deprivation of Due Process under the Fourteenth Amendment are "limited," *United States v. Lovasco*, 431 U.S. 783, 789 (1977), has nevertheless held that those circumstances do exist in some cases and that dismissal in such cases is the appropriate remedy. *See, e.g., United States v. Gouveia*, 467 U.S. 180, 192 (1984). The United States Supreme Court has never explicated an exact test for those circumstances, however,

leading lower courts to fashion their own, as this Court appropriately did in *Rogers* - and as is totally appropriate and normal in our judicial system. The existence of different tests evinces the efforts of different jurists to faithfully enact the protections demanded of the Fourteenth Amendment. It is evidence of "reasonable differences of opinion," not of erroneous legal analysis, as the State suggests. *Poole* at 506. This Court, in *Rogers*, "faithfully and competently carried out its duty," *Id.*, in applying the broad strictures announced in cases such as *Lovasco* and fashioned a more concrete standard for Florida - a standard which, to this day, is good law, in an area of law which the United States Supreme Court has not further elucidated.

The federal circuit split amongst Courts of Appeals which the State points to in its Answer only elucidates this point further - there is no binding command from a higher authority that this Court is compelled to answer to on this issue, save for its own prior precedent in *Rogers*. Federal Circuit Courts of Appeals have fashioned their own tests, as different jurists executing their duties, with some coming to honest differences of opinions - although several, it should be noted, have come to the same conclusions as this Court did in *Rogers*. *See Jones v. Angelone*, 94 F.3d 900 (4th Cir. 1996); *United States v.*

Moran, 759 F. 2d 777, 782 (9th Cir. 1985). As such, the State's invitation to engage in an analysis of whether to recede from *Rogers* under the *Poole stare decisis* framework is mistaken as this case is not one where this Court is governed by a higher legal authority beyond its own precedent, and this Court should not take the State up on its offer.

Even if this Court were to undertake a *Poole* analysis, *Rogers* is not clearly erroneous such that it warrants receding from it. As explained earlier, different courts have come to different determinations of when a motion for dismissal based on pre-indictment delay should be granted. Such a variety of opinion, without a clear mandate from the United States Supreme Court, particularly where two federal Circuit Courts of Appeals are in accord with Florida's current law, demonstrates that the *Rogers* precedent is far from erroneous, but rather a sound application of law. Indeed, as this Court noted in *Poole*, "reasonable differences of opinion" are not a proper basis for concluding that a precedent is clearly erroneous - "There is room for honest disagreement, even as we endeavor to find the correct answer." *Poole* 297 So. 3d 487, 506 (quoting *Gamble v. United States*, ___ U.S. ___ (2019) (Thomas, J.,

concurring). The sort of honest disagreement evinced in the various federal circuits is no reason for this Court to recede from precedent and overturn its own sound judgement on this issue.

Further, language from this court's opinion in *Poole* is instructive on when receding from precedent is appropriate and why it would be inappropriate here: in *Poole*, this court determined its decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), was clearly erroneous because it took what was "a narrow and predictable ruling that should have had limited practical effect on the administration of the death penalty in our state as an occasion to disregard decades of settled Supreme Court and Florida precedent." *Poole*, 297 So. 3d 487, 506 (Fla. 2020). Receding from *Rodgers* would be doing exactly what this Court in *Poole* contemplated as what it should not have done in *Hurst*: engaging in judicial activism to affect a change in law disregarding decades of settled precedent for no compelling reason.

This Court recognized the danger in disturbing precedence, stating, "It is no small matter for one Court to conclude that a predecessor Court has clearly erred." *Id.* Here, there is no reason for this Court to conclude that its predecessor Court has clearly erred. Certainly, it is unquestionably not a justification to overrule

precedent when the composition of this Court changes and subsequent members may, acting on a clean slate, decide a case differently. As this Court has explained, "A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and the system of law which it is our abiding mission to serve." *N. Fla. Women's Health and Counseling Servs., Inc. v. State* at 638-39 (Fla. 2003). Where, as here, the State, for the first time and in its Answer Brief, implores this Court to overturn decades of prior precedent which is not erroneous, much less clearly erroneous, without any mandate from a higher legal authority this Court is bound to uphold, this Court must reject the invitation.

If this Court is nevertheless compelled to overrule decades of precedent which is not at all clearly erroneous, it should remand this case to the post-conviction court to allow Mr. Jackson the opportunity to develop a record and develop his claim of ineffective assistance of counsel based on the bad faith prong that the State urges this Court to adopt as a standard for dismissals of cases for

pre-indictment delay, or whatever new standard this Court does adopt.

ISSUE 7 IN REPLY: THE POST-CONVICTION COURT ERRED IN FINDING THAT CUMULATIVE ERROR DID NOT DEPRIVE MR. JACKSON OF A FUNDAMENTALLY FAIR TRIAL

The State contends that this Court does not need to undertake a cumulative prejudice analysis because Mr. Jackson "failed to show his claims were not procedurally barred or that counsel was deficient. [In the instant case], there is no deficient performance; there is therefore no need to consider cumulative prejudice." (AB. 109). Contrary to the State's assertion, however, the post-conviction court found several areas of deficient performance by Mr. Jackson's trial lawyers. The post-conviction court specifically found:

> "[t]here is no question that aspects of Defense counsels' overall performance related to the DNA evidence in this case were below what would reasonably be expected of an attorney defending a capital case. Defendant's case was pending for approximately three years and, outside of requesting the FDLE reports and documentation, original trial counsel did next to nothing to investigate the accuracy of Ms. Clark's opinions or learn about the DNA evidence obtained from the crime scene. Substitute trial counsel retained a DNA expert, Nancy Peterson, to consult on these issues, but did not retain her until approximately two months before trial. Further, counsel at first gave Ms. Peterson incorrect documents to review, supplied the correct documents only a few days before the trial, and did

> not receive her final opinions about critical DNA evidence until the same day jury selection concluded (with opening statements scheduled for the next day). The State's case against Defendant was almost entirely based on forensic evidence obtained from the crime scene, and DNA evidence was one of two key pieces of forensic evidence linking Defendant to the victim's murder. Defense counsel did not treat the DNA evidence with the level of importance for such critical evidence."
> R. at 1632-33 (internal citations omitted).

Further, while ultimately not making a finding as to deficient performance, the post-conviction court did make special note that, "Whether [trial counsels'] seventeen-month delay in locating and contacting Defendant's alibi witnesses fell below what was professionally required to render effective assistance of counsel is a close question." R. at 1687.

Given the findings of deficient performance, this Court should properly examine the question, despite the State's erroneous assertions that there was no deficient performance and therefore no need to examine cumulative prejudice. And because this is a case of ineffective assistance of counsel, "any analysis of prejudice must be done on a cumulative basis." *Parker v. State*, 89 So. 3d 844, 860 (Fla. 2011). Particularly in this case, where, as the post-conviction court noted, "I'm sure [all parties involved in this case] know what this case

is about . . . the DNA evidence was -- I mean, that and the fingerprint was it, really," R. 1759, cumulative prejudice is particularly pernicious.

In a case which, as the post-conviction court noted, was not strong for the State, the risk of the denial of the inalienable right to a fair and impartial trial because of multiple errors that are harmless individually, yet cumulatively weighty, is especially grave. *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (quoting *Brooks v. State*, 918 So. 2d 181, 202 (Fla. 2005)). This Court cannot fail to undertake such a cumulative prejudice review, which will properly show that Mr. Jackson was aggrieved of both deficient performance and prejudice from his trial counsels' ineffective assistance of counsel and must be granted a new trial.

In so doing, this Court should be mindful that it "must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors [resulting from ineffective assistance of counsel], and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have

had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 695-96. Finally, it should be cognizant that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

Trial counsels' representation of Mr. Jackson at the trial below was not the "meaningful adversarial testing" or "guiding hand of counsel" envisioned under *Powell v. Alabama*, 287 U.S. 45, 69 (1932), *United States v. Cronic*, 466 U.S. 648, 654-656 (1984) and *Strickland*. There can be no confidence in the verdict and Mr. Jackson's case should be remanded for a new guilt phase trial.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Jackson respectfully urges this Court to reverse the circuit court and remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of the Appellant has been furnished via electronic service to Jason Rodriguez, Assistant Attorney General, on this 9th day of August, 2021.

s/ *Karin L. Moore*
KARIN L. MOORE

CERTIFICATE OF COMPLIANCE FOR COMPUTER GENERATED BRIEFS

I hereby certify that the foregoing Reply Brief complies with the briefing, word-count, and other formatting requirements for computer-generated briefs, pursuant to Fla. R. App. P. 9.210.

s/ *Karin L. Moore*
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